Supreme Court, U.S.
FILED

NOV 20 2003

No. 03 906

IN THE
Supreme Court of the United States

Richard O'Brien,

Petitioner

vs.

City of Hackensack

Respondent

ON A PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner asks this Court, in light of its decision in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), to specify what, if any, evidence beyond the false and pretextual reasons asserted by a public employer for terminating an employee after a course of discriminatory conduct need to be proffered by the undisputably rehabilitated employee to establish liability under the ADA for his wrongful termination and loss of career as a firefighter? And should the employer have to prove the specific reasons relied upon as the basis for termination?

2. Should a public employee, dismissable only for cause, have a constitutionally protected property interest in their tenure and be protected from deprivation of due process in his termination in view of Board of Regents of States Colleges v. Roth, 408 U.S. 564, 578 (1972), Perry v. Sindermann, 408 U.S. 593, 602-603 (1972), Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985)? Did the fact of no *ex parte* finding of probable cause due to the underlying offense charged was not indictable, create the risk of erroneous deprivation of due process rights as explained in Gilbert v. Homar, 520 U.S. 924, 935 (1997)?

PARTIES TO PROCEEDING

Petitioner - Richard O'Brien

Respondent - City of Hackensack, New Jersey, with no parent or publicly held company owning 10% or more of the corporation's stock.

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Appendix C - Order by Honorable Joel A. Pisano, District Judge, District of New Jersey, dated May 8, 2002, granting defendant's motion for summary judgment, denying plaintiff's motion for partial summary judgment as moot, and closing case, and Opinion, dated May 6, 2002.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit appears at Appendix A is unpublished.

The Opinion of the United States District Court, District of New Jersey, appears at Appendix C is unpublished.

JURISDICTION

The jurisdiction of the District Court was invoked under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et.seq. and the Rehabilitation Act, 29 U.S.C. §§ 791 et.seq., and under 28 U.S.C. § 1331. The judgment of the United States Court of Appeals for the Third Circuit was entered April 17, 2003. The Court of Appeals denied a timely petition for rehearing on June 23, 2003. On September 22, 2003, Justice Souter signed an Order extending time for filing this petition for certiorari to and including November 20, 2003. The jurisdiction of This Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title I of the ADA provides in pertinent part:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.42 U.S.C. § 12112(a) (2000).

Title II of the ADA provides in pertinent part:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132 (2000).

The ADA defines a "qualified individual with a disability" as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8)

A "disability" is defined by this statute as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual, " or "a record of such impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(2)

The ADA specifically prohibits employers from discriminating against drug addicted employees who have sought rehabilitation and are no longer using drugs. 42 U.S.C. § 12114(b)

The ADA provides that a "qualified individual with a disability' does not include an "employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a)

The Rehabilitation Act provides in pertinent part:

No otherwise qualified individual with a disability in the United States, ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... 29 U.S.C. § 794(a) (2000)

The Rehabilitation Act provides further that

the standards used to determine whether this section has been violated in a complaint alleging employment discrimination

under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d)

STATEMENT OF THE CASE

This matter concerns the efforts of Richard O'Brien, a firefighter for the City of Hackensack, to secure the assistance of his employer in maintaining his rehabilitation from a cross addiction to drugs and alcohol. Instead, his employer ensured that he stayed in unpaid status for the next two and one half years (excepting two months) until it could terminate him.

O'Brien was a firefighter for the City of Hackensack from 1989 to 1995 with no serious disciplinary proceedings and positive evaluations. (App. A, pg. 4) His department head, Chief Richard Johnson was notified by O'Brien that he had a substance abuse problem and successfully sought treatment in mid-1994, "and was, by late 1994, no longer abusing drugs and alcohol." (Id.)

However, medication prescribed after emergency room treatment in November, 1994 due to a line of duty injury "had the unexpected consequence of precipitating anew O'Brien's drug abuse problem." (App. A, pg. 5) After missing numerous days of work, he notified Chief Johnson that he had a problem and requested assistance. Chief Johnson advised him in December 1994, when he sought leave, to stay at home. At a meeting in early January, 1995, he ordered O'Brien to undergo drug testing, for which he tested positive for drug use. Johnson ordered O'Brien to produce medical documentation regarding his condition and treatment.

Subsequently, Chief Johnson issued a department wide order advising that O'Brien was not allowed in any firehouse because disciplinary charges were pending. At the March 29, 1995, disciplinary hearing, among other findings, the City Manager found that some of his absences and failure to attend Fire Department-ordered medical evaluations were due to his enrollment in an inpatient drug treatment program. Due to his actively seeking treatment (with several negative drug tests), the City Manager found that New Jersey law protected his addiction status as a handicap and converted the discharge into a 60-day suspension without pay (Id.)

O'Brien appealed the decision (New Jersey Merit System Board never heard the appeal due to subsequent

October, 1995 settlement) based upon documentation he submitted evincing successful treatment (including inpatient), negative drug tests, and an independent assessment indicating a recommendation that O'Brien continue his participation in Narcotics Anonymous (Pl. brf. 6,7) "O'Brien doubted whether more time off work would be necessary or helpful to his continue recovery and he expressed particular concern about his ability to finance the drug treatment ordered by the City Manager. (App. A, pg. 6)

The City expected O'Brien to reimburse the expense of the 28 days of inpatient treatment, knowing by memorandum from their own benefits representative that there was a 20 day limit. The personnel director also advised the City Manager that the health insurance provider determined he was not a candidate for in or out-patient treatment (Pl. brf. 6). As a result the "City Manager and the City's attorney engaged in internal discussions regarding whether it was appropriate to require inpatient treatment and whether the City might reimburse some of O'Brien's treatment expenses. As a result, a revised plan was tentatively set forth which included some city financial support for O'Brien's rehabilitation. There is no evidence that the revised plan ever received final approval from the City or was tendered to O'Brien..." (App. A, pg. 6)

At the time O'Brien's suspension was to end, the City issued another disciplinary notice June 20, 1995 for his alleged plea of guilty to attempted theft of a spare tire (at the time of arrest). However, the City conducted a hearing on August 3, 1995 with no result because the charge had been dismissed by the Municipal Court Judge on July 6, 1995 (Pl. brf. 9) During that time, the City attempted to remove him from his position in accordance with N.J.S.A. 2C:51-2, but made no findings due to the statute requiring reinstatement to his position upon the judge's dismissal of the charges, N.J.S.A. 2C:51-2c[1] (Pl. brf. 9) After the August 3, 1995 hearing the City again issued a disciplinary notice alleging O'Brien failed to "attend all of the required rehabilitation programs." (App. A, pg. 6)

Upon the dates set for hearing this charge in September, 1995, the City engaged in settlement discussions due to O'Brien filing charges with EEOC (and New Jersey

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[1] ...restored, if feasible to his office, position or employment with all the rights, emoluments and salary thereof from the date of forfeiture.

Division of Civil Rights) "alleging discrimination based upon his drug-addiction status." (Id.) In return for O'Brien dismissing these charges and the previous appeal of his March, 1995 hearing, the City agreed to reinstatement. At the time of the agreement being made in October, 1995, O'Brien had been in unpaid status for eleven months, as a result he agreed to plead guilty to the conduct unbecoming a public employee charge as a result of the tire theft charge in June, 1995 resulting in the unpaid time off being converted into suspension without pay. He also agreed to continue outpatient treatment for six months and drug testing.

O'Brien continued attending Alcoholics Anonymous, and although the City agreed to secure and fund the outpatient treatment, it never did and he was awaiting notice from a program he contacted himself, when he was subjected to charges stemming from an arrest for possession of .33 grams of burned marijuana cigarettes after a traffic stop in December, 1995. O'Brien submitted a negative drug test taken shortly after the arrest and the drug charges were dismissed. After a disciplinary hearing held in March, 1997, the City issued a decision in May, 1997 terminating him as of December 12, 1995 based upon conduct unbecoming a public employee for the arrest, as well as insubordination for failure to enroll in outpatient therapy. He subsequently filed the instant suit.

The District Court opined that summary judgment was appropriate for the City based upon O'Brien's failure to establish a *prima facie* case on two grounds: (1) O'Brien was not a qualified individual in accordance with the ADA because he continued "to use and possess illegal drugs until his final suspension from the fire department in December 1995. "(App. C, pg. 25); and (2) he was not terminated due to his disability but as a result of (i) his conduct unbecoming a public employee for two arrests, June 1, 1995 for stealing a spare tire and December 9, 1995 for possession of a controlled dangerous susbstance, and (ii) insubordination based upon his failure to enroll in an inpatient drug treatment program as mandated by the City after his March, 1995 disciplinary hearing. O'Brien also asserted a Privacy Act claim under 5 U.S.C. § 551, which the Court dismissed because it only applies to actions by the federal government. The Court relied upon the Third Circuit's "distinction between adverse employment action due to "addiction-related misconduct" and an adverse employment action "due to the disability of an addiction." Salley v. Circuit

City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998). (App. A, Pg. 27)

The United States Court of Appeals for the Third Circuit upheld the District Court's affirmance of summary judgment on a narrower ground:

> No one could reasonably conclude, on this record, that O'Brien was terminated for his addiction, rather than for the misconduct of drug use and possession. The record reveals that the City clearly terminated O'Brien in response to his arrest for possession of drugs, which is a permissible reason under the ADA. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998).

The Court opined that O'Brien "must show animus directed strictly toward the plaintiff's addiction status." (App. A, pg. 8). "After showing some tolerance for O'Brien's addiction in the past, the City promptly terminated him after the arrest. It acted in accordance with N.J.A.C. 4A:2-2.3(a)6, which permits the discipline of public employees for "[c]onduct unbecoming a public employee." Arrest on drug possession is plainly unbecoming conduct. (Id.)

REASONS FOR GRANTING THE PETITION

The ADA provides protection for individuals who are handicapped, as well as those with a disability stemming from drug and alcohol abuse. This protection is critical for two reasons: (1) once the individual comes to the realization that a drug and/or alcohol problem exists, they can either attempt to cope with it on their own, an endeavor that requires considerable determination and effort, including extra effort to continue to function fully in their respective employment, or they should be able to notify their employer that a problem exists and realize support and/or accommodation in their rehabilitation effort, which scenario should result in a greater chance of success; and (2) if the individual cannot expect the protection from adverse employment action from their employer, they will continue in their employment with the addiction disability and it will be only a matter of time when this will result in their failure to function effectively:

> This bill strikes a delicate balance. It recognizes the need to protect employers, workers and the public from person whose current illegal drug use impairs their ability to perform a job and whose employment could result in serious harm to the lives and property of others. At the same time, the bill recognizes that treatment for those in the grips of substance abuse is not the only compassionate thing to do but an essential component of a comprehensive attack on drugs. Treatment can save the lives of individual abusers, and it can also return them to productive roles in society.... By providing protections against discrimination for recovered substance abusers and those in treatment or recovery who are no longer engaged in illegal drug use, the bill provides an incentive for treatment. Under this bill, no one who seeks treatment and overcomes a drug abuse problem need fear discrimination because of past drug use. Congressman Rangel, Chairman, House Select Committee on Narcotics, Cong. Rec. (H2443-2444), May 17, 1990

For public employees such as a firefighters, police officers or emergency medical technicians, who are the first

responders in emergencies engendering the trust and faith of the public when they are in dire straits, attempting to function with such a disability because they cannot rely upon the protection of the ADA could result in injury to the public as well as themselves.

Additionally, the ADA protection encompasses those individuals who recover from drug problems without formal treatment:

> This protection ... extends those who overcome such [drug] problems without the help of formal treatment - including individuals who are able to stop using illegal drugs on their own or through participation in self-help groups such as Narcotics Anonymous. In addition, the Act's protections extend to rehabilitated individuals who no longer use illegal drugs, but who continue to participate in drug treatment programs... or continue to receive after-care counseling or participate in self-help groups. Senator Kennedy, on of the bill's sponsors, Cong. Rec. (S 10774-10775), September 7, 1989

Petitioner urges the Court to revisit Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), to resolve what appears to be a continuing "conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." [citations ommitted] at 140, and to decide whether discrimination cases which ultimately focus on whether the employer's reason for termination was discriminatory and proceed without going through the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and instead focus on the ultimate question of discrimination *vel non*, as pointed out by this Court in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-15 (1983).

The concurring opinion in Wells v. Colorado Dept. of Transp., 325 F.3d 1205 (10th Cir. 2003) explains correctly that Courts need to focus on the ultimate question of discrimination *vel non* in discrimination cases:

> If it is inappropriate to concern ourselves with whether the plaintiff has proved a prima facie case when we review a judgment after a trial in which the employer introduced evidence of its reasons for adverse actions against the plaintiff, it should also be inappropriate to worry about the prima facie case when we review a summary-judgment proceeding in which the employer proffered such evidence. Id. at 1228

The confusion inherent in determining whether discrimination motivated the employer stems from this Court's previous decision limiting the employer's evidentiary burden to that of persuasion in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) by explaining that:

> ...the defendant's explanation of its legitimate reasons must be clear and reasonably specific... Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant will normally attempt to prove the factual basis for its explanation... we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking in factual basis is a pretext. Id. at 258.

By requiring employers to meet the burden of persuasion, rather than merely production of the legitimate, non-discriminatory reason for its adverse employment action, the concern articulated by Justice Souter in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993): "The majority fails to explain how the plaintiff, under its scheme, will ever have a "full and fair opportunity" to demonstrate that the reasons not articulated by the employer, but discerned in the record by the factfinder, are also unworthy of credence." Id. at 534, would be answered. Thereby obviating the plaintiff's need to disprove conceivable explanations for the employer's actions suggested by the evidence, Id. at 537.

As this Court explained in Reeves, 530 U.S. at 141: "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness'testimony as to the employer's mental processes,"

(citing Aikens, 460 U.S. at 716) and held that: "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 148. By requiring the employer to produce and persuade the fact finder why it acted as it did against the employee, the fact finder would not have to rely on trying to find some other non-discriminatory reason.

The permissive holding in Reeves therefore has resulted in the interpretation that plaintiffs still need to satisfy the rebuttal framework, such as the 6th Circuit established in Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078 (10th Cir. 1994): "This circuit... has held that "[t]he jury may not reject an employer's explanation [of its action] unless there is sufficient basis in the evidence for doing so." Id. at 1083, as explained in Peters v. Lincoln Elec. Co., 285 F.3d 456 (6th Cir. 2002) that plaintiff cannot rely simply upon its prima facie case to prove that employer's articulated reason did not actually motivate the discharge "... but must, instead, introduce additional evidence of [prohibited] discrimination. Id. at 472. The Second Circuit also interpreted Reeves as not answering yes or no to whether when a plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, non-discriminatory explanation for its action, by noting:

> It is arguable that the Supreme Court's reading of *Fisher* [v. Vassar College, 114 F.3d 1332 (2d Cir. 1997(en banc)] was inaccurate. We read *Fisher* as consonant with *Reeves*: Both hold that the quantum of evidence needed to sustain an inference of discrimination is the same as that needed to sustain the ultimate inference in any other civil case... Schnabel v. Abramson, 232 F.3d 83, 89 n. 5 (2d Cir. 2000)

This type of reasoning has resulted in other circuits also deciding that Reeves requires that case by base analysis:

> *Reeves* reinforced the prior law in this circuit that even if the trier of fact disbelieves the nondiscriminatory explanation given by the employer, the trier is not compelled to find that the real reason was

> discrimination. Reeves at 530 U.S. at 147, 120 S.Ct. 2097: Thomas [v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999)] 183 F.3d at 57. That is because the ultimate question is not whether the explanation was false, but whether discrimination was the cause of the termination. We have adhered to a case by case weighing. Zapato-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 45 (1st Cir. 2002)

However, another 1st Circuit opinion referes to "... the proposition that a court assessing discriminatory motive may consider "the specific sequence of events leading up to the challenged decision." Wallace v. O.C. Tanner Recognition Co., 299 F.3d 96, 102 n. 5 (1st Cir. 2002) (citing Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 168-69 (1st Cir. 1998)). The 5th Circuit also questions the impact of Reeves where the plaintiff must still face the "clearly more qualified standard" for employment discrimination, Price v. Federal Express Corp., 283 F.3d 715, 723 (5th Cir. 2002), with the recent concurring opinion asking whether Daines v. Texas Department of protective & Regulatory Services, 164 F.3d 277 (5th Cir. 1999) still survives Reeves, Manning v. Chevron Chemical Co., LLC., 332 F.3d 874, 884-5 (5th Cir. 2003).

Recently, the New Jersey Supreme Court decided that "Given the confusion that often results when the first and second stages of the McDonell Douglas test goes to the jury, we recommend that the court should decide both those issues." Mogull v. CB Commerical Real Estate, 162 N.J. 449, 473 (2000), which resulted in revised Model Civil Jury Charges be adopted in discrimination cases:

> The *McDonnell Douglas* test was devised by the United States Supreme Court in the context of summary judgment practice, and was adopted as a means to determine whether a plaintiff had sufficient circumstantial evidence to raise a triable issue of fact on the issues of discrimination to withstand a motion for summary judgment. As the New Jersey Supreme Court observed in *Mogull*, however this framework has "consfuse[d] lawyers and judges, much less juries who do not have the benefit of extensive study of the law on the subject." *Mogull*, 162 N.J. at 471. Accordingly, the New Jersey Supreme Court recommended that the first

two stages of the *McDonnell Douglas* test be decided by the court, and not the jury. Id. at 473.

In this matter, the Third Circuit opined that "in order to make out a prima facie case for discrimination in such cases, the plaintiff must show animus directly strictly toward the plaintiff's addiction status." App. A, pg. 8 This requires plaintiff's proof of discriminatory intent, although O'Brien produced a deliberate course of discriminatory conduct by his employer that started when he requested assistance with his cross addiction to alcohol and drugs after prescribed medication by the emergency room physician caused the uninteded side effect of his involvement with drugs and alcohol. The Court found that O'Brien "had not been involved in any serious disciplinary proceedings [prior to 1994]" App. A, pg. 4. However, the City found that:

> A public employee serving as a firefighter is entrusted daily with the personal safety of the citizens he serves and his fellow firefighters. The past history of Firefighter O'Brien's disciplinary problems and drug abuse, while tragic, are undisputed. The City has met its legal responsibilities over this period of time, to proactively, and with the expenditure of significant public funds, assist Firefighter O'Brien on the path of rehabilitation. This has not been successful. The fact that sixty (60) days after returning to work (after a seven month period of suspension/leave of absence due to a drug abuse problem) Firefighter O'Brien is again found to be in possession of a controlled dangerous substance, speaks volumes on the seriousness of this situation. May 14, 1997 opinion by City Manager LaCava

This opinion contains disputed facts that could not and should not be resolved at summary judgment. There was no past history of O'Brien's disciplinary problems or drug abuse: (1) He pleaded guilty to conduct unbecoming a public employee for his June 1, 1995 arrest for attempting to steal a spare tire. Despite the fact that the offense was for a tire less than $200, which makes it a disorderly persons offense (New Jersey does not use the terminology misdemeanor and felony, but disorderly persons offenses are misdemeanors), New Jersey

law does not allow its criminal code to penalize an individual for attempt to commit a disorderly persons offense[2]. O'Brien's plea of guilty was at the police station after the arrest for the purposes of setting bail, when he finally appeared before the Municipal Court Judge on July 6, 1995 the matter was dismissed. His previous disciplinary proceeding finding him guilty on April 19, 1995 for (i) chronic absenteeism, (ii) abandoning position, (iii) conduct unbecoming a public employee, and (iv) insubordination, stemmed from the time that he was ordered to stay at home by Chief Johnson after admitting to a drug abuse problem in December, 1994. (2) O'Brien had no record of drug abuse except for his admitting to a problem and his sole positive drug test, at the time he was asking for assistance, in January, 1995. (3) The City did not meet any of its obligations in assisting O'Brien with his rehabilitation, quite the opposite, when O'Brien was enrolled in inpatient rehabilitation at the beginning of February, 1995 (which was approved by the City's representative and confirmed by an internal memorandum issued before the City Manager's April 19, 1995 opinion) he was found guilty of absenteeism, abandoning his position, conduct unbecoming a public employee and insubordination while he was undergoing treatment. The Court found that "The drug arrest charges were later dismissed, and O'Brien submitted a drug test, from very shortly after his arrest, showing no signs of current drug use. Also, despite the City's promise to help find a program for him, O'Brien had contacted an outpatient program solely through his own efforts, and was awaiting notice fromthe program as to when he was to begin treatment." App. A, pg. 7 The City had agreed in its October, 1995 settlement agreement:

> We recognize -- the City recognizes that Mr. O'Brien's insurance may or may not cover formalized outpatient therapy programs, and we understand that he is without independent funds to place himself in such a program. We are going to try to get our own City Hospital to approve such a plan, but in the meantime, if that doesn't work, Mr. O'Brien is going to continue going to his programs with Al-Anon or Ar-Anon.
> MR. O'BRIEN: AA.

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[2] see State v. Clarke, 198 N.J.Super. 219, 225-226 (App.Div. 1985)

> MR. GUIDA: AA, and will report monthly to Chief Johnson to show attendance at those programs, weekly attendance at those programs. In the event that we do or we are able to get a formalized progam which is beneficial to Mr. O'Brien, Mr. O'Brien has agreed to participate in that program as long as he is not financially bound to those programs, and that's understandable. So we are going to try through our own hospitalization to try to resolve something along those lines. If we can't, then we can't. (October 13, 1995 transcript, labor attorney Guida, and O'Brien, Ja195:14-196:11)

At his termination hearing on Mayrch 27, 1997, the City personnel director admitted that none of the funds appropriated for O'Brien's treatment were ever spent (March 27, 1997 transcript, pg. 96). As a result, there were no expenditures of funds by the City. (4) All of O'Brien's treatment and his continuing attendance at Alcoholics Anonymous meetings were accomplished on his own initiative. It is undisputed that he was and stayed alcohol and drug free, as his numerous negative drug tests confirmed, therefore his rehabilitation was successful. (5) The City Manager noted parenthetically that O'Brien was suspended for drug abuse, the record speaks for itself that he was suspended for disciplinary charges brought by the City, none of which found that O'Brien was abusing drugs. As a matter of fact, his drug previous drug abuse problem would never have been known without his admitting it to Chief Johnson when he sought help in December, 1994. And finally, (6) O'Brien was never found to be in possession of a controlled dangerous substance, not before or after his admitting to a drug abuse problem. His December, 1994 arrest was premised upon Officer Casper of the Berfenfield Police Department stopping him while he was driving someone else's car in a snow storm for allegedly having his driver's license suspended. This charge was dismissed at the outset of the Municipal Court proceedings. In a search incident to arrest, two burnt marijuana cigarettes were found in a jacket inner pocket (Bergenfield Police Department Arrest Report-indicating O'Brien was unemployed, former Hackensack Fire Department, dated December 9, 1995, Ja206; incident report dated December 11, 1995, indicating stop at 21:15:43 and one

male to P[olice] H[eadquarters] FTA warrants at 21:19:22, Ja207; Arrest report narrative, dated December 9, 1995, Ja208) The two burnt marijuana cigarette butts were found in a cigarette box in the jacket O'Brien put on when exiting his vehicle, which was searched outside of his view in the Bergenfield Police headquarters. The total weight of these consumed cigarettes was .33 grams (1 ounce equals 28 grams, therefore .33 grams is .0118 of an ounce). He was charged with N.J.S.A. 2C:35-10(a)(4), possession of less than 50 grams (disorderly persons offense - N.J.S.A. 2C:1-4b specifies that disorderly persons offenses "are petty offenses and are not crimes within the meaning of the Constitution...Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime.") The consumed butts could not have been consumed by O'Brien, as he "submitted a drug test, from very shortly after his arrest, showing no signs of current drug use." (App. A, pg. 7)

The Third Circuit did not find that O'Brien's termination for insubordination due to failure to attend inpatient treatment was warranted. The Court did find his arrest for possession of CDS did warrant termination. However, the New Jersey Merit System Board reiterated its policy in Register v. Lloyd McCorkle Training School, 92 N.J.A.R.2d 697 (CSV, 1992):

> Under these circumstances, the Board FINDS that a disciplinary penalty is not warranted. In making this determination, the Board is mindful that employee rights must be equitably balanced with the State's legitimate interest in public safety and in promoting and maintaining a drug-free work place. The harsh consequences of removal would not only terminate appellant from his current position but would also preclude him from future public employment, thus punishing him perpetually for voluntarily admitting to his drug problem and seeking treatment. In so doing, it would also discourage other persons with a drug problem from seeking treatment and rehabilitation. The board also notes that in *In the Matter of Daniel Cahill, Firefighter, City of Newark, N.J.Super. (App.Div. 1991)*, the court found that an addiction, habituation, or dependency which results from use of drugs renders a person handicapped and therefore

> entitles him to protection under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Accordingly, the court concluded that an employer must accommodate an employee handicapped by substance abuse by affording him an opportunity for rehabilitation.
>
> The Board recognizes that drug abuse is a serious offense. This is especially true in a correctional facility where for reasons of safety and security it is of paramount interest that correction officers are neither using nor under the influence of drugs. However, an effective drug policy should encourage voluntary rehabilitation efforts by employees. This is especially true in the circumstances of the instant case in which appellant sought treatment on his own initiative, and their is no evidence of his prior drug use having interfered with his performance of his duties whatsoever. Id., Register, at 698

The New Jersey Merit System Board policy mandates progressive discipline in matters such as O'Brien's and would not have upheld his termination for the misdemeanor arrest:

> The purpose of the civil service law is to provide public employees with job security and to protect them from arbitrary and unreasonable employment decisions. In New Jersey, a system of progressive discipline has evolved in response to these goals. Progressive discipline assures public employees that they will be given some opportunity to improve their job performance before they forfeit their positions. On the other hand, immediate removal of a permanent career employee may be appropriate and need not be preceded by less severe penalties. See *Golaine v. Cardinale, 142 N.J.Super. 385, 395-96 (Law Div. 1976)*. However, an employee's conduct must be egregious before the policy of progressive discipline is circumvented. Troutman v. East Jersey State Prison, 93 N.J.A.R.2d 710, 712 (CSV, 1993)

Therefore, the termination of O'Brien on this charge is both a

disputed issue of material fact which precludes summary judgment, as well as not supportable by New Jersey law.

O'Brien was deprived of his consitutionally protected property interest in his tenure as a firefighter by being terminated without due process, as mandated by Board of Regents of States Colleges v. Roth, 408 U.S. 564, 578 (1972); Perry v. Sindermann, 408 U.S. 593, 602-603 (1972).

For major discipline, the New Jersey Department of Personnel regulations require:

> (a) The hearing shall be held before the appointing authority or its designated representative.
> (b) The employee may be represented by an attorney or authorized union representative.
> (c) The parties shall have the opportunity to review the evidence supporting the charges and present and examine witnesses. The employee shall not be required to testify, but an employee who does testify will be subject to cross-examination.
> (d) Within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action. N.J.A.C. 4A:2-2.6

Hackensack conducted O'Brien's disciplinary hearing to terminate his employment on March 27, 1997 (Hackensack city manager's May 14, 1997 findings Ja230-235). The appointing authority produced one witness, personnel director Gordon Sieck, whose testimony consisted of describing disciplinary notices issued to O'Brien(pages 54 to 65), and labor attorney Raymond Wiss, Esq., reading excerpts of the Bergenfield Municipal Court proceedings transcripts into the record (pages 66-79), followed by cross examination (pages 79 to 95), with redirect (pages 95 to 96). Not a single fact witness was produced at the hearing regarding O'Brien's alleged CDS possession, although Hackensack's proffer at the beginning of the hearing by labor attorney Raymond R. Wiss, Esq. (upon presenting the transcript of the Municipal Court proceedings to

O'Brien's attorney for the first time) was that the Bergenfield police officers were going to testify. Notwithstanding this fact, city manager Lacava makes the following finding:

> I have reviewed this transcript. The proof of Firefighter O'Brien's guilt is overwhelming. Suffice it to say that Bergenfield Police Officer Casper's testimony is comprehensive and credible. He is a Police Officer who testified as to the reason for the motor vehicle stop; the arrest of Firefighter O'Brien; the subsequent search of Firefighter O'Brien's jacket; and the discovery of marijuana in Firefighter O'Brien's jacket. This is a witness with "no axe to grind" and surely no motivation to lie.
>
> Firefighter O'Brien, on the other hand, initially claimed that the substances (I note that it appears that trace amounts of cocaine were also found on Firefighter O'Brien at the time of the arrest. Since he was not charged with this additional offense in Municipal Court or in these proceedings, I will disregard such information) were "planted" on him by Officer Casper. Then during his testimony in Bergenfield Municipal Court he could not confirm or deny that the cigarette box containing the marijuana was in his jacket (as testified to by Officer Casper). I find neither of Firefighter O'Brien's "explanations" credible.
>
> Lacava May 14, 1997 findings, Ja234.

However, Officer Casper did not testify and the City Manager's finding of credibility was not based upon testimony but the Municipal Court transcripts, and O'Brien had no opportunity, as a result, to cross examine Officer Casper, although the adminstrative code provides that parties have a right to present and examine witnesses.

This Court was presented with the issue of whether a State violates the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay in Gilbert v. Homar, 520 U.S. 924 (1997). The Court noted that public employees who can be discharged only for cause have a consitutionally protected property interest in their tenure and

cannot be fired without due process, Board of Regents of States Colleges v. Roth, 408 U.S. 564, 578 (1972); Perry v. Sindermann, 408 U.S. 593, 602-603 (1972). It also identified three distinct factors that are balanced to determine what due process is constitutionally due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest. Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

As to the employees private interest in uniterrupted receipt of his paycheck, "So long as the suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively insubstantial (compared to termination), and fringe benefits such as health and life insurance are often not affected at all... On the other side of the balance, the State has a signficant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers... The last factor in the *Mathews* balancing, and the factor most important to resolution of this case, is the risk of erroneous deprivation and likely value of any additional procedures... Gilbert, at 931-33

The Court accepted that an *ex parte* finding of probable cause such as a grant jury indictment would provide adequate assurance that suspension was not unjustified. "It is true... that there is more reason to believe an employee has committed a felony when he is indicted rather than merely arrested and formally charged; but for the present purposes arrest and charge give reason enough. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted" Id. at 934 (citing FDIC v. Mallen, 486 U.S. 230, 240 (1988). The Court concluded by noting that "Once the charges were dropped, the risk of erroneous deprivation increased susbtantially, and ... there was likely value in holding a prompt hearing." Id. at 935, and remanded the matter for determination of whether petitioners violated due process by failing to provide a sufficiently prompt postsuspension hearing.

Id. at 936

The New Jersey Administrative Code for Department of Personnel mandates that when suspending an employee based upon criminal complaint or indictment, a Preliminary Notice of Disciplinary Action ("PNDA") must be served, N.J.A.C. 4A:2-2.7(a). Next, the employee may request a departmental hearing within five days of receipt of the Notice.. "limited to this issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment." N.J.A.C. 4A:2-2.7(a)(1) O'Brien's union requested delaying the hearing until his Municipal Court matter was resolved. However, immediate suspension was only authorized if

> it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. N.J.A.C. 4A:2-2.5(a)(1)

or if the employee is charged with a first through third degree crime, or a crime of the fourth degree on the job or directly related to the job, N.J.A.C. 4A:2-2.5(a)(2). O'Brien was charged with N.J.S.A. 2C:35-10(a)(4), possession of less than 50 grams (disorderly persons offense), and should not have been suspended immediately without pay. The drug charges were dismissed by way of conditional discharge, N.J.S.A. 2C:36A-1 on November 5, 1996. Chief Johnson received a letter from the union on November 21, 1996 advising that the charges were disposed of, and that reinstatement, back pay, seniority, and benefits were demanded. A fitness for duty hearing was requested by letter dated December 19, 1996. The City responded to neither request, instead issued another PNDA on February 6, 1997, three months after disposition, although the administrative code required an FNDA be issued upon disposition of any criminal complaint or indictment, N.J.A.C. 4A:2-2.7(b). A hearing is to be held within 30 days, N.J.A.C. 4A:2-2.5(d), which hearing was held March 21, 1997. Although the decision was to be made by the City within 20 days, the decision to terminate issued on May 15, 1997. Therefore, the City from December, 1994, through May, 1997 kept O'Brien in unpaid status for the entire time, less October through the first week in December, 1995 (which was the

result of the parties' settlement agreement). As a result, O'Brien lost his career as a firefighter and could not be employed in any other jurisdiction.

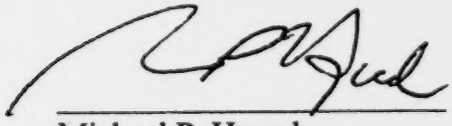
Therefore, both the grounds for the suspension as well as the conduct of the termination hearing and its findings are disputed facts by O'Brien and should not have been resolved on summary judgment due to evidence that O'Brien successfully sought rehabilitation, stayed alcohol and drug free and continued attending Alcoholics Anonymous meetings, as the parties' October, 1995 settlement agreement required. On the other hand, the City never met any of the obligations of its settlement agreement and continued to find a way to discipline O'Brien, resulting in termination. Petitioner contends that he has presented both direct and circumstantial evidence of discriminatory conduct by the City, thereby defeating summary judgment.

Should the actions of the City not be subject to challenge, the national implication to all public employees, especially those under great stress as first responders, is that ADA protection will not be afforded when they request treatment for addiction disabilities, thereby discouraging rehabilitation and affecting the safety of other public employees, as well as the public they protect and serve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Michael P. Hrycak

Date: November 20, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2614

RICHARD O'BRIEN,
Appellant

v.

CITY OF HACKENSACK,

Appeal from the United States District Court
for the District of New Jersey
(D.C.Civ.No. 98-cv-5728)
District Judge: Honorable Joel A. Pisano

Submitted Under Third Circuit LAR 34.1(a) April 10, 2003

Before: BARRY and ROSENN, Circuit Judges, POLLAK, District Judge[1]

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey

Appendix A

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[1] Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation

and was SUBMITTED on April 10, 2003.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered May 8, 2002, be, and the same is hereby AFFIRMED. Each side to bear itw own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: April 17, 2003

Certified as a true copy and issued in lieu of a formal mandate on July 1, 2003

Teste: s/Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2614

RICHARD O'BRIEN,
Appellant

v.

CITY OF HACKENSACK,

Appeal from the United States District Court
for the District of New Jersey
(D.C.Civ.No. 98-cv-5728)
District Judge: Honorable Joel A. Pisano

Submitted Under Third Circuit LAR 34.1(a) April 10, 2003

Before: BARRY and ROSENN, Circuit Judges, POLLAK, District Judge[2]

OPINION OF THE COURT

ROSENN, Circuit Judge:

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[2] Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation

I.

This appeal concerns whether the City of Hackensack ("City") violated the Americans with Disabilities Act and the Rehabilitation Act, by discriminating against Richard O'Brien because of his drug and alcohol addiction. O'Brien alleged in his complaint that the City had terminated him on the basis of a drug and alcohol addiction. He sought relief under the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. §§ 12101, et seq. and the Rehabilitation Act, 29 U.S.C. §§ 791 et seq.[3] The City filed a motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, which the District Court granted in its entirety. Accordingly, the court dismissed all of O'Brien's claims.[4] O'Brien timely appealed. We affirm.

O'Brien was a firefighter for the City of Hackensack from 1989 to 1995. Prior to 1994, he had received only positive evaluations from the Fire Department and had not been involved in any serious disciplinary proceedings. In mid-1994, O'Brien admitted to the head of the Fire Department, Chief Richard Johnson, that he had a substance abuse problem, and that he was seeking treatment for the problem. Johnson condoned O'Brien's efforts to seek treatment, and no disciplinary action was taken against him at that time. O'Brien successfully completed a substance abuse rehabilitation program, and was, by late 1994, no longer abusing drugs and alcohol.

However, in November 1994, a prescription medication, ordered by O'Brien's doctor, had the unexpected consequence of precipitating anew O'Brien's drug abuse

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[3]The Rehabilitation Act provides that "the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d); see Donahue v. Consolidated Rail Corp., 224 F.3d 226, 229 n.2 (3rd Cir. 2000). Therefore the analysis in this opinion focuses solely on discrimination under ADA standards, inasmuch as this analysis determines the disposition of both legal claims.

[4]O'Brien also sued under the Privacy Act, 5 U.S.C. §§ 551-552, which the District Court dismissed on summary judgment. However, O'Brien has not appealed the dismissal of this claim.

problem, which caused O'Brien to miss numerous days of work. During December 1994, O'Brien sought hospitalization for treatment. However, his insurance provider would not cover this service. In early 1995, O'Brien confessed a relapse to Johnson, who ordered that O'Brien be examined by the Hackensack City Physician and City Psychologist. Johnson subsequently heard allegations that O'Brien had appeared at fire stations apparently under the influence of drugs or alcohol. As a result, Johnson ordered O'Brien to stay away from the workplace. Later, at a meeting to discuss O'Brien's future in the Fire Department, Johnson asked O'Brien to undergo a drug screening. O'Brien tested positive for drug use.

After the drug results were known, Johnson preliminarily terminated O'Brien, subject to a disciplinary hearing, on the grounds that O'Brien had not provided medical documentation to vouch for numerous absences, that he had appeared at work apparently under the influence of drugs, and that he had refused to undergo the prescribed examinations by City physicians.

O'Brien contested most of the charges against him at a March 1995 disciplinary hearing before the City Manager. In his decision, the City Manager found that, although O'Brien had missed some days of work without leave and did come to work apparently under the influence of drugs or alcohol, these incidents were the result of his drug addiction. Similarly, his failure to appear for Fire Department-ordered medical evaluations was due to his enrollment in an inpatient drug treatment program. Thus, the City Manager held that his transgressions were substantially attributable to his addiction for which O'Brien actively was seeking treatment. Noting that addiction status was a protected handicap under New Jersey law, the City Manager converted the discharge to a 60-day suspension without pay. This afforded O'Brien an opportunity to fully rehabilitate. The City Manager conditioned O'Brien's return to work on his participation in a City-approved drug treatment program, including an inpatient care regimen, and his submission to periodic drug tests upon his return to work.

O'Brien appealed the City Manager's decision. O'Brien submitted documentation to the City suggesting that he was drug free and was no longer in need of the intesive drug treatment recommended by the City Manager. He asserted that, in February 1995, he had participated in a drug therapy

program, including inpatient care, and he presented drug testing results that showed he had been drug free since. O'Brien doubted whether more time off work would be necessary or helpful to his continued recovery, and he expressed particular concern about his ability to finance the drug treatment ordered by the City Manager. The City Manager and the City's attorney engaged in internal discussions regarding whether it was appropriate to require inpatient treatment and whether the City might reimburse some of O'Brien's treatment expenses. As a result, a revised plan was tenatively set forth which included some city financial support for O'Brien's rehabilitation. There is no evidence that the revised plan ever received final approval from the City or was tendered to O'Brien at this time.

In June 1995, O'Brien was arrested and pled guilty to the crime of stealing a tire. O'Brien was preliminarily terminated for this occurrence; however, the guilty plea was subsequently vacated and the disciplinary action against O'Brien was suspended pending further action on the criminal prosecution.

Later, in August 1995, O'Brien faced another disciplinary order of termination. This order charged him with disobeying the City Manager's orders by failing to attend all of the required rehabilitation programs. Around this time, O'Brien filed charges with the EEOC and the New Jersey Division of Civil Rights, alleging discrimination based upon his drug-addiction status. In October 1995, the parties settled the outstanding termination action against O'Brien on terms that would have O'Brien withdraw his pending EEOC and New Jersey complaints, and the court would order him reinstated, provided he remained alcohol-and drug-free and that he maintain enrollment in an outpatient treatment program for six months after his return to work. O'Brien would also agree to a suspension without pay, in addition to the earlier suspension levied for his 1995 charges, as punishment for the tire theft charges against him. The City agreed to help O'Brien secure and fund an outpatient therapy program. However, the City later shifted the burden back to O'Brien to find outpatient treatment on his own.

O'Brien returned to work in October 1995, and there is no evidence that he continued to use drugs over the next two months. In December 1995, O'Brien was arrested on charges

of possession of marijuana. The City again preliminarily terminated O'Brien on the grounds of conduct unbecoming a public employee, and failure to obey the order to undergo six months outpatient care, as specified in the earlier settlement of disciplinary charges against him. The drug arrest charges were later dismissed, and O'Brien submitted a drug test, from very shortly after his arrest, showing no signs of current drug use. Also, despite the City's promise to help find a program for him, O'Brien had contacted an outpatient program solely through his own efforts, and was awaiting notice from the program as to when he was to begin treatment. The City Manager heard his appeal of the preliminary discharge, and, noting the gravity of a drug offense shortly after O'Brien's return to work after suspension for drug abuse, issued a decision in May 1997 upholding the discharge, based on both the arrest and on his failure to undergo outpatient therapy. O'Brien subsequently filed the instant suit.

II.

Our review of a summary judgment motion is plenary. Only if there is no evidence from which a rational person could conclude that the plaintiff's position is correct should summary judgment be granted. Olson v. General Electric Astrospace, 101 F.3d 947, 951 (3d Cir. 1996).[5]

To set forth a prima facie case under the ADA, a plaintiff must show "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discriminatin." Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998). Here, O'Brien has failed to establish the third prong of the test. No one could reasonably conclude, on this record, that O'Brien was terminated for his addiction, rather than for the misconduct of drug use and possession. The record reveals that the City clearly terminated O'Brien in response to his arrest for possession of drugs, which is a

[5]The District Court exercised original jurisdiction pursuant to 28 U.S.C. § 1331. This court's appellate jurisdiction is proper under 28 U.S.C. § 1291.

permissible reason under the ADA. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998).

Where there exists a meaningful distinction between discrimination based on addiction status and discrimination based on work misconduct related to drug use is a debatable point. With respect to most other disabilities, a termination may be unlawful "if the employee's violation [of work rules] stems from his or her disability." where an employer can otherwise accommodate the disability. Id. However, "Congress has decided to treat drug and alcohol addiction differently from other disabilities by ensuring that employers do not have to go through the accommodation process in these cases." Id. Therefore, in order to make out a prima facie case for discrimination in such cases, the plaintiff must show animus directed strictly toward the plaintiff's addiction status. An employer need not show any tolerance for work-related problems that are a consequence of drug or alcohol use. Thus, termination based on drug possession and failure to accommodate drug-related misconduct are not violations of the ADA. Absent evidence that the employer was motivated by the employee's status, as opposed to mere drug use or possession, there can be no ADA discrimination claim. O'Brien has not demonstrated that the actions of the City were motivated by his status, rather than by his drug possession. Only when he was arrested for drug possession was he terminated. After showing some tolerance for O'Brien's addiction in the past, the City promptly terminated him after the arrest. It acted in accordance with N.J.A.C. 4A:2-2.3(a)6, which permits the discipline of public employees for "[c]onduct unbecoming a public employee." Arrest on drug possession is plainly unbecoming conduct.

O'Brien takes issue with the District Court's factual finding that he was currently using drugs at the time of his arrest; discharge for "current use" of drugs in unprotected under the ADA. The City was not motivated by O'Brien's actual use of drugs at the time of discharge, but by his possession of drugs and his arrest on a drug-related charge. These are valid bases on which to terminate an employee under the ADA, regardless of how one construes "current use." The third prong of the prima facie case of disability discrimination has not been met, and O'Brien's case fails as a matter of law. The judgment of the District Court will be affirmed. Each side

to bear its own costs.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Max Rosenn
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2614

RICHARD O'BRIEN,
Appellant

v.

CITY OF HACKENSACK,

Appeal from the United States District Court
for the District of New Jersey
(D.C.Civ.No. 98-cv-5728)
District Judge: Honorable Joel A. Pisano

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, ROSENN,[1], Circuit Judges, and POLLAK, District Judge[2]

(Filed Jun 23 2003)

Appendix B

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[1]Honorable Max Rosenn, Senior Circuit Judge, was a member of the original panel and voted as to panel rehearing only.

[2]Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation, was a member of the original panel and voted as to panel rehearing only.

SUR PETITION FOR REHEARING EN BANC

The petition for rehearing having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court:

s/ Max Rosenn
Circuit Judge

Dated: JUN 23 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CLOSED

Richard O'Brien Plaintiff, v. City of Hackensack Defendant.	Civil Action No. 98-CV-5728 (JAP) **ORDER**

For the reasons set foth in the Court's decision, dated May 6, 2002, Defendant's motion for summary judgment is granted. Plaintiff's motion is denied as moot. The case is closed.

s/Joel A. Pisano
Joel A. Pisano
U.S. District Judge

Orig; Clerk
cc: Magistrate Judge Arleo
All Parties
File

Appendix C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CLOSED

Richard O'Brien Plaintiff, v. City of Hackensack Defendant.	Civil Action No. 98-CV-5728 (JAP) **OPINION**

APPEARANCES:

Michael P. Hrycak, Esq.
316 Lenox Ave.
Westfield, NJ 07090
Attorney for Plaintiff

Raymond R. Wiss, Esq.
Wiss, Cooke & Santomauro
Three University Plaza
Suite 297
Hackensack, NJ 07601
Attorney for Defendants

PISANO, District Judge:

I. INTRODUCTION

Plaintiff Richard O'Brien ("O'Brien"), a former fire fighter, filed this lawsuit under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101- 12117, the Rehabilitation Act, 29 U.S.C. §§ 701-796, and the Privacy Act, 5 U.S.C. §§ 551-552, against his former employer, defendant City of Hackensack ("Hackensack"). Specifically, O'Brien, who filed the Complaint pro se but who has subsequently retained counsel, alleged that hackensack discriminated against him on the basis of his disability "[a]s specified in but not limited to the [ADA], Privacy Act, and the Rehabilitation Act." (Compl.)

This court exercises original jurisdiction pursuant to 28 U.S.C. § 1331. Pending before this Court are cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. Hackensack seeks summary judgment on all claims, whereas, O'Brien seeks partial summary judgment asking that the Court declare that O'Brien is a qualified individual with a disability.[1] (Pl. br. at 14) The Court decides these motion without oral argument pursuant to Fed. R. Civ. P. 78. for the reasons stated herein, the court grants hackesnack's motion for summary judgment because O'Brien cannot establish a prima facie case of discrimination. In addition, O'Brien's claim under the Privacy Act is dismissed because Hackensack is not a federal agency. Further, O'Brien's motion is denied as moot.

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[1]Hackensack filed a forty page reply brief without obtaining permission of the Court in violation of Local Civil Rule 7.2(b). That rule provides in pertinent part:

> Any brief shall include a table of contents and a table of authorities and shall not exceed 40 ordinary type or printed pages (15 pages for any reply brief submitted under L. Civ. R. 7.1(d) and any brief in support of a motion for reargument submitted under L. Civ. R. 7.1(g), excluding pages required for the table of contents and authorities. Briefs of greater length will only be accepted if special permission of the Judge or Magistrate judge is obtained prior to submission of the brief.

Accordingly, Hackensack's reply brief will be stricken from the record and will not be considered by the Court.

II. STATEMENT OF FACTS

Hackensack hired O'Brien as a firefighter in 1990. (Johnson dep. at 8) In June 1994, O'Brien told hackensack Fire Chief Richard Johnson ("Johnson") that he was experiencing problems related to excessive use of alcohol. (Johnson dep. at 9) Thereafter, In December 1994, O'Brien told Johnson that he was also using drugs. (O'Brien Dep at 18) At that time, O'Brien requested leave in an attempt to enter an inpatient detoxification program. (Tr. of March 29, 1995 at 150) However, since such a program was not covered by O'Brien's health insurance plan, and he was not financially capable of paying for such a program himself, he was unable to enroll.. (Tr. of March 29, 1995 at 150) As a result, on January 2, 1995, O'Brien met with Johnson to discuss his possible treatment and future with the fire department. (Johnson dep. at 20) At this meeting, Johnson requested that O'Brien undergo a drug test. (Johnson dep. at 20)

O'Brien submitted to a drug test on January 11, 1995, which determined that O'Brien had both cocaine and marijuana in his system. (def. ex. D) Thereafter, Johnson advised O'Brien, on January 26, 1995, that he needed to submit a letter from his personal physician explaining his drug treatment before he would be permitted to return to work. (Tr. of March 29, 1995 hearing at 29) Johnson sent O'Biren a letter dated January 30, 1995, advising him that his employment would be terminated if he did not provide a medical report by February 2, 1995. (def. ex. E)

On February 7, 1995 Dr. Sklar, O'Brien's physician, advised Johnson that he had been treating O'Brien for substance abuse since June 1994. Dr. Sklar noted that he had sent O'Brien to an outpatient clinic for substance abuse in November 1994, but O'Brien had apparently left that program. (def. ex. F)

On February 24, 1995, Johnson issued a Special order advising all fire department personnel that O'Brien was not permitted in the firehouse at any time. (Johnson dep. at 20) Thereafter, hackensack issued O'Brien a Preliminary Notice of Disciplinary Action ("PNDA") on February 26, 1995 alleging:

chronic absenteeism in violation of N.J.A.C. 4A:2-2.3(a)4[2]; abandoning of position in violation of N.J.A.C. 4A:2-6.2[3]; conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6[4]; and insubordination in violation of N.J.A.C. 4A:2-2.3(a)2[5]. (def. ex. G)

James LaCava ("LaCava"), Hackensack's City Manager conducted a hearing on these charges on March 29, 1995. Thereafter, on April 18, 1995, LaCava issued a written opinion sustaining the charges filed against O'Brien and holding that the termination of O'Brien's employment was warranted. LaCava explained:

> Accordingly, termination is warranted. However, I accept the conclusion that O'Brien is a handicapped person whose condition falls within the protection of the New Jersey Law Against Discrimination. I accept further that Mr. O'Brien's personnel file is free of prior disciplinary problems, and that he has been trying to deal with his drug abuse problem by seeking medical help and therapy. I also accept that two recent drug test were negative for drugs. Accordingly, I suspend the

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[2]N.J.A.C. 4A:2-2.3(a)4 provides "[a]n employee may be subject to discipline for:... 4. Chronic or excessive absenteeism or lateness.

[3]N.J.A.C. 4A:2-6.2 provides in pertinent part:
(a) If an employee resigns without complying with the required notice in N.J.A.C. 4A:2-6.1, he or she shall be held as having resigned not in good standing.
(b) Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be reasonably denied.
(c) An employee who has not returned to duty for five or more conseccutive business days following an approved leave of absence shall be considered to have abandoned his or her position.

[4]N.J.A.C. 4A:2-2.3(a)6 provides "[a]n employee may be subject to discipline for:... 6. Conduct unbecoming a public employee.

[5]N.J.A.C. 4A;2-2.3(a)2 provides "[a]n employee may be subject to discipline for: 2. Insubordination.

> order or termination subject to Mr. O'Brien's meeting certain conditions which I believe faily meet the concerns of the City regarding safety to its citizens and employees, and its obligation to reasonably try to accommodate Mr. O'Brien's handicap.

(def. ex. H at 2) LaCava also found that O'Brien's drug use "would most certainly cause injury to himself or to others." Id.

This order placed O'Brien on an involuntary leave of absence commencing April 20, 1995 for a period of not less than 60 days, during which time O'Brien was required to: (1) enter into an inpatient drug abuse program for at least 28 days; (2) upon completion of the inpatient program, enter into an outpatient therapy program for a minimum of 20 sessions; and (3) present himself for a fitness for duty examination. (def. ex. H)

Upon completion of outpatient therapy, O'Brien was to be reinstated as a firefighter conditioned on his remaining in an outpatient therapy program for 6 months following his return to work. O'Brien was also required to submit to drug tests for one year. (def. ex. H) LaCava's Opinion was made final by a Final Notice of Disciplinary Action ("FNDA") dated April 19, 1995. (def. ex. I) O'Brien appealed this decision to the New Jersey Department of Personnel ("DOP"). (def. ex. J)

On June 6, 1995, the Hackensack City Council agreed to pay medical costs of up to $7,000 for inpatient treatment for O'Brien not otherwise covered by medical insurance. (def. ex. K)

O'Brien found trouble again on June 1, 1995, when he was arrested for attempting to steal a spare tire in Englewood Cliffs. (def. ex. M) As a result, Hackensack filed a PNDA on June 20, 1995 charging O'Brien with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6). (def. ex. M) O'Brien was immediately suspended without pay. (def. ex. M) O'Brien initially pleaded guilty to the theft charge, but that plea was eventually vacated and the charges were dismissed. (Pl. Br. at 7)

Thereafter, on August 21, 1995, Hackensack issued a third PNDA charging O'Brien with failure to comply with the April 19, 1995 Order in violation of N.J.A.C. 4A:2-2.3. (def.

ex. N)

With the disciplinary charges still pending, O'Brien filed discrimination charges with the New Jersey Division on Civil Rights and the Equal Opportunity Employment Commission ("EEOC"), on September 8, 1995, alleging that Hackensack's actions violated the ADA. (def. ex O)

City Manager LaCava conducted hearings on September 5, and October 5, 1995, concerning the two pending PNDAs. (O'Brien dep. at 48) At these hearings, the parties agreed that O'Brien would plead guilty to the charge of conduct unbecoming a municipal employee; that O'Brien would withdraw his appeal of the April 1995 decision; that O'Biren would withdraw his complaint with DOP and the EEOC alleging discrimination under the ADa; that Hackensack would return O'Brien to his duties as a firefighter; that hackensack would not require O'Brien to reimburse unemployment benefits that he collected during his suspension; that O'Brien would continue his outpatient therapy for drugs and alcohol for six months following his return to work and provide proof of such attendance; and, that O'Brien wouldbe tested for alcohol or drug use. (Tr. of October 5, 1995 at 50-58) This agreement was finalized on october 13, 1995.

As a result, O'Brien was cleared for duty and assigned to First Platoon, beginning October 17, 1995. (def. ex. R)

O'Brien's problems were renewed on December 9, 1995, when he was arrested in Bergenfield and charged with possession of marijuana. (def. ex. W) As a result, Hackensack issued a PNDA on December 11, 1995, charging O'Brien with conduct unbecoming a public employee in violation of N.J.A.C. 4A;2-2.3(a)6; and insubordination in violation of N.J.A.C. 4A:2-2.3(a)2 for failure to comply with the terms of the earlier agreements. (def. ex. X) These charges resulted in O'Brien's suspension pending the disposition of the criminal complaint. (def. ex. X) Following, his release from custody, O'Brien voluntarily underwent a drug test, on December 11, 1995, which was administered by his personal physician Dr. Paul Diamond. This test indicated that O'Brien had no drugs or alcohol in his system. (O'Brien cert. at 30-31)

A trial was conducted in Bergenfield Municipal Court on June 25, 1996 and November 5, 1996 on the marijuana

possession charges. Trial testimony established that a Bergenfield Police Officer stopped O'Brien on December 9, 1995, for a motor vehicle code violation. (Tr. of July 25, 1996 at 5 to 16) The police officer determined that O'Brien's driver's license had been suspended and warrants for his arrest were outstanding; therefore, he placed O'Brien under arrest and transported him to the Bergenfield Police Station. The Police Officer searched O'Brien while he was in custody and found two foil packets containing a white substance in O'Brien's pants, as well as, a cigarette box containing two burnt marijuana cigarettes in his jacket. (Tr. of Nov. 5, 1996 at 18 to 19)

Near the conclusion of the case, O'Brien requested that the Court withhold its decision to allow him to enter a drug treatment program. O'Brien entered such a program, therefore, the Municipal Court granted O'Brien a conditional discharge on November 5, 1996.

LaCava conducted a hearing on the pending disciplinary charges on March 21, 1997. (def. ex. CC) In a written Opinion, dated May 14, 1997, LaCava found that O'Brien's termination effective December 12, 1995 was warranted based upon findings of conduct unbecoming a public employee and insubordination. In sum, LaCava concluded that O'Brien's employment should be terminated to ensure public safety and the safety of O'Brien's fellow firefighters. LaCava explained:

> A public employee serving as a firefighter is entrusted daily with the personal safety of the citizens he serves and his fellow firefighters. The past history of Firefighter O'Brien's disciplinary problems and drug abuse, while tragic, are undisputed. The City has met its legal responsibilities over this period of time, to proactively, and with the expenditure of significant public funds, assist Firefighter O'Brien on the path of rehabilitation. This has not been successful. The fact that sixty (60) days after returning to work (after a seven month period of suspension/leave of absence due to a drug abuse problem) Firefighter O'Brien is again found to be in possession of a controlled dangerous

> substance, speaks volumes on the seriousness of this situation.

(def. ex. CC) LaCava issued a Final Notice of disciplinary Action on May 15, 1997, terminating O'Brien's employment for the reasons set forth in his May 14, 1997 Opinion (def. ex. DD)

O'Brien filed an administrative Complaint with the EEOC on november 13, 1997, alleging that from September 8, 1995 to March 10, 1997, Hackensack had committed acts which violated O'Brien's rights under the ADA. (def. ex. EE) The EEOC issued a right to sue letter on September 28, 1998. (def. ex. FF)

O'Brien filed the instant Complaint pro se on December 21, 1998. Hackensack filed a motion to dismiss on May 13, 1999, which Judge lechner granted as unopposed on June 18, 1999. However, that dismissal was vacated by the United States Court of Appeals for the Third Circuit on July 10, 2000, because Counsel had filed an appearance on O'Brien's behalf on May 28, 2000 and the Appeals Court believed that Judge Lechner did not allow Counsel sufficient time to respond to the motion to dismiss. The Third Circuit explained that the Motion relied upon facts outside the pleadings and O'Brien was not given "a reasonable opportunity to rpesent all material made pertinent to such a motion by Rule 56." O'Brien v. Hackensack, No. 99-5604 (3d Cir. May 30, 2000) Slip Op. at 8-9. Thereafter, final pretrial statements were filed. The instant motions followed.

III. SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the moving party must establish "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The district court's task is to determine whether disputed issues of material fact exist, but the court cannot resolve factual disputes in a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).

In determining whether a genuine issue of material fact

exists, the court must view the facts in the light most favorable to the non-moving party and extend all reasonable inferences to that party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Stephens v. kerrigan, 122 F.3d 171, 176-77 (3d Cir. 1997). The moving party always bears the intial burden of demonstrating the absence of a genuine issue of material fact, regardless of which party ultimately would have the burden of persuasion at trial. Celotex Corp. v. Catret, 477 U.S. 317, 323 (1986). Once the moving party has met its opening burden, the non-moving party must identify, by affidavits or otherwise, specific facts showing that genuine issues exist for trial. Id. at 324. Thus, the non-moving party may not rest upon the mere allegations or denials of its pleadings. Id. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

The Supreme Court has specifically recognized that:

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupportable claims or defenses, and [] that [the rule] should be interpreted in a way that allows it to accomplish this purpose.

Celotex, 477 U.S. at 323-24. Thus, "[W]hen the record is such that it would not support a rational finding that an essential element of the non-moving party's claim or defense exists, summary judgment must be entered for the moving party." Turner v. Schering-Plough Corp., 901 F.2d 335, 341 (3d Cir. 1990).

In employment discrimination claims, a defendant is entitled to summary judgment if it can demonstrate that the plaintiff can not carry the burden of proof at trial. Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989). This can be demonstrated in one of two ways. First a defendant may show that the plaintiff is unable to establish a prima facie case of discrimination. Id. at 707. Second, if the plaintiff has

successfully established a prima facie case of discrimination, the defendant is entitled to summary judgment if it can show that the plaintiff cannot produce sufficient evidence of pretext to rebut the defendant's asserted nondisriminatory reaons for the discharge. Id. at 707.

A plaintiff may defeat a motion for summary judgment (or judgment as a matter of law) by pointing "to some evidence, direct or circumstantial, from which a factfinder would reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating ot determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

IV. DISCUSSION[6]

A. ADA and the Rehabilitation Act

The ADA[7] prohibits employers from discriminating

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[6]Although the discussion in this Opinion focuses on O'Brien's claim under the ADA, it applies equally to his claim under the Rehabilitation Act. Donahue v. Consolidated Rail Corp., 224 F.3d 226, 229 n.2 (3d Cir. 2000). The Rehabilitation Act provides that "the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d).

[7]Title I of the ADA provides in pertinent part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2000). Title II of the ADA provides in pertinent part: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the servides, programs, or activities or a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2000).
The Rehabilitation Act provides in pertinent part:

against a qualified individual with a disability, because of that disability, "regarding job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Taylor v. Phoenixville School Dist., 184 F.3d 296, 305 (3d Cir. 1999) (quoting 42 U.S.C. § 12112(a)). Therefore, "an employer commits unlawful discrimination under the ADA if the employer does 'not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardhsip onthe oepration of the business of [the employer].'" Taylor, 184 F.3d at 311 (quoting 42 U.S.C. § 12112(b)(5)(A)).

The ADA defines a "qualified individual with a disability" as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id. (quoting 42 U.S.C. § 12111(8)). This means that plaintiff must possess all of the prerequisites for holding the position such as "possessing the appropriate educational background, employment experience, skills, licenses, etc." Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998) (citing 29 C.F.R. Pt. 1630, App. § 1630.2(m) at 351). A "disability" is defined by this statute as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual, " or "a record of such impairment," or "being regarded as having such an impairment." Id. at 306 (42 U.S.C. § 12102(2)).

The United States Court of Appeals for the Third Circuit has dictated that the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S.

> No otherwise qualified individual with a disability in the United States, ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

29 U.S.C. § 794(a) (2000)

792 (1973), is to be utilized in analyzing ADA claims. Shaner v. Synthes(USA), 204 F.3d 494, 501 (3d Cir. 2000) (citing walton v. Mental health Ass'n of Southeastern Pa., 168 F.3d 661, 667-68 (3d Cir. 1999)). The McDonnell Douglas framework consists of three stages. Id. First, the plaintiff must esablish a prima facie case of discrimination. McDonell Douglas, 411 U.S. at 802. Second, if the plaintiff satisfies this initial burden, the defendant must articulate a "legitimate, nondiscriminatory reason for the empoyee's rejection." Id. Third, if the defendant carries its burden, the plaintiff then receives the opportunity to offer prove that the defendant's proffered "legitimate nondiscriminatory" explanation was a pretext for discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). While the burden of production may shift, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff remains at all times with the plaintiff." Id.

An ADA plaintiff establishes a prima facie case of discrimination by demonstrating that: (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination. Gaul v. Lucent Technologies, Inc., 234 F.3d 576, 579 (3d Cir. 1998) (citing Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996)). "[T]he burden is on the employee to prove that he is 'an otherwise qualified' individual." Id. (citing Buckingham v. United States, 998 F.2d 735, 739-40 (9th Cir. 1993)).

In the instant case, O'Brien cannot establish a prima facie case of discrimination. First, O'Brien cannot establish that he was otherwise qualified for a position as a firefighter. Second, O'Brien cannot establish that he was terminated because of his disability. O'Brien's inability to establish either of these facts defeats his claim, therefore, summary judgment is appropriate.

i. Qualified individual with a disability

O'Brien asserts that despite his history of substance

abuse, he was "a qualified individual with a disability" for a position as a firefighter. (P. br. at 16) However, this assertion fails to take into account the facts which clearly indicate that O'Brien continue to use and possess illegal drugs until his final suspension from the fire department in December 1995.

O'Brien is correct in his assertion that the ADA specifically prohibits employers from discriminating against drug addicted employees who have sought rehabilitation and are no longer using drugs. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 980 n.2 (3d Cir. 1998) (citing 42 U.S.C. § 12114(b)). However, the plain language of the statute limits that protection to rehabilitated empoyees. Id. The ADA provides that a "qualified individual with a disability' does not include an "employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a).

The EEOC's Technical Assistance Manuel on the ADA interprets this section of the ADA, it provides:

> "Current" drug use means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem. It is not limited to the day of use, or recent weeks or days in terms of an employment action. It is determined on a case-by-case basis.

Salley, 160 F.3d at 980 n.2 (quoting Equal Employment Opportunity commission, Technical Assistance Manuel on the Employment Provisions (Title I) of the ADA § 8.3 (1992)). Similarly, "current drug use" has been defined by other district courts in this Circuit to include "illegal drug use that bears a temporal relationship to the employment action such that an employer may reasonably conclude at the time of the employment action that illegal drug use is an ongoing problem." Law v. Garden State Tanning, 159 F.Supp.2d 787, 793 (E.D. Pa. 2001) (citing Salley v. Circuit City Stores, Inc., No. 96-6368 (E.D. Pa. Oct. 29, 1997), aff'd on other grounds, 160 F.3d 977 (3d Cir. 1998)).

All of the facts submitted in this case lead to the sad clnclusion that O'Brien continued to use drugs and alcohol

throughout his tenure as a firefighter. This behavior occurred before, during and after his suspension from the department. The recuring nature of O'Brien's drug use is best illustrated in O'Brien's Deceember 9, 1995 arrest in Bergenfield where he was found to be in possession of cocaine and two partially burned marijuana cigarettes. Notwithstanding the results of the blood test taken by his private physician, indicating that he did not have drugs in his system, the fact remains that he was arrested with drugs in his possession, only sixty days after his reinstatement. This clearly illustrates O'Brien's continuing drug dependency.

O'Brien does not fit the definition of a "qualified individual with a disability." Therefore, he cannot establish a prima facie case of discrimination.

ii. Termination as a result of disability

Another element of a prima facie case of discrimination requires O'Brien to establish that he was terminated because of his drug use. However, this is simply not the case.

The Third Circuit has recognized a distinction between an adverse employment action due to "addiction-related misconduct" and an adverse employment action "due to the disability of an addiction." Salley v. Circuit City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998). Generally speaking, an employer canot fire an employee because of the "disability of addiction" without running afoul of the ADA; however, it is legitimate for an employer to terminate an employee due to his or her "addiction-related misconduct." Id. Therefore, Courts have repeatedly recognized that "while the ADA 'protects an individual's status as an alcoholic, merely being an alcoholic does not insulate one from the consequences of one's actions.'" Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1182-83 (6th Cir. 1997) (citing Flynn v. Raytheon, 868 F.Supp. 383, 387 (D.Mass. 1994); Larson v. Koch Refining Co., 920 F.Supp. 1000, 1004 (D. Minn. 1996))

The ADA provides that an employer may hold an alcoholic or drug-dependent employee "to the same qualification standards for employment or job performance and behavior that such entity hold other employees, even if any

unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. § 12114(c). The ADA "operates to allow employers to respond to addiction-related misconduct in a way that they cannot respond to other disability related misconduct." Salley, 160 F.3d at 981. For example, an employer is not obligated to accommodate absenteeism attributable to alcoholism. Smith v. Davis, 248 F.3d 249, 251 (3d Cir. 2001). On the other hand, an employer's refusal to allow an employee to enter an alcohol treatment center without being terminated is a failure to provide a reasonable accommodation.

In this case, O'Brien was terminated for conduct unbecoming a public employee and insubordination. With regards to the charge of conduct unbecoming a public employee, Town Manager LaCava's Opinion specifically points to O'Brien's two arrests in 1995, i.e., the June 1, 1995 arrest in Englewood Cliffs for stealing a spare tire, and the December 9, 1995 arrest in Bergenfield for possession of a controlled dangerous substance. With regards to the insubordination charge, LaCava's opinion points to O'Brien's failure to enroll in an inpatient drug treatment program, in violation of the April 18, 1995 Opinion, that allowed him to return to work after his first suspension. O'Brien did not enroll in such a program despite the fact that Hackensack made funds available to O'Brien to pay for the treatment.

Hackensack did not terminate O'Brien because of his disability. In fact, throughout the course of O'Brien's employment with Hackensack, the city made a number of accommodations in an attempt to help him overcome his drug and alcohol dependency. In the end, O'Brien was terminated because his actions were found to be unbecoming a public employee and for failing to comply with the April Order that allowed him to return to work after his initial suspension. As a result, O'Brien cannot establish that he was terminated because of his disability. Therefore, he cannot establish a prima facie case of discrimination. Summary judgment is appropriate.

B. Privacy Act

O'Brien asserts a claim under the Privacy Act claiming

that Hackensack "compromise[d] [his] relationship with his labor union by unlawfully releasing confidential medical information to unauthorized personnel." (Compl.) However, O'Brien cannot possibly recover against Hackensack under this statute because it applies to actions by the federal government, not actions of state and local governments. 5 U.S.C. § 551: Ciccone v. Waterfront Commission of New York Harbor, 438 F.Supp. 55, 58 (S.D.N.Y. 1977). Since Hackensack is not an agency of the federal government, this claim cannot survive summary judgment.

V. CONCLUSION

For the reasons set forth above, this Court grants Hackensack's motion for summary judgment. An appropriate order is attched.

Date: May 6, 2002

s/ Joel A. Pisano
JOEL A. PISANO
U.S. District Judge

Orig: Clerk
cc: Magistrate Judge Arleo
All Parties
File